for debate, it should first be inquired, what is the general practice and usage of the country. This will generally be found of a controlling character.

(3.) If neither of the foregoing rules afford any clear indication in regard to the matter, resort must be had to the time and purpose of the erection, and the expectation or understanding of the parties interested in opposite directions at the time of the erection of the structure, or the attachment of the article to the freehold. There will commonly arise out of this inquiry some clear guide to the solving of all doubt. But it should always be borne in mind, that this latter mode of solving the question is only to be resorted to where both the former ones fail to afford any satisfactory solution. For the practice which has obtained in some of the American states, of allowing houses and barns and mills to be treated as mere personalty, although built in the ordinary mode, upon the ground of some oral contract, expectation, or understanding among the parties interested therein, cannot fail to prove in the end of evil consequence and tendency, and cannot be too decidedly repudiated by all lovers of good order and sound law: *Leland* v. *Gassett*, 2 Wash. Dig. Vt. Rep. 335, 336; s. c. 17 Vt. Rep. (on another trial) 403; *Preston* v. *Briggs*, 16 Id. 124; *Van Ness* v. *Pacard*, 2 Peters's S. C. Rep. 137.[1]

RECENT AMERICAN DECISIONS.

Superior Court of Cincinnati.

DUMONT v. WILLIAMSON.

The meaning and purpose of an indorsement without recourse, examined and adjudged.

When a note is sold in market, the vendor and vendee being upon equal terms, having each the same knowledge of the parties to the instrument, and there is no concealment or misrepresentation by the vendor, who indorses it "without recourse," he is not liable to the vendee, if the name of one of the parties is forged.

[1] But such an article as a pump, as before intimated, if erected by the owner of the land, will go with the land by deed, or mortgage, or descent, or devise. But if placed there by a tenant it is removable: *McCracken* v. *Hall*, 7 Ind. 30. So in regard to other doubtful cases, the contract of the parties is of great weight: *Brearley* v. *Cox*, 4 Zab. 287.

He is not liable on any supposed contract growing out of his indorsement, as it is but a transfer of the note, without the usual guaranty: nor can he be held at all unless fraud, concealment, or misrepresentation is proved, or the note is given in payment of a prior indebtedness.

The opinion of the court was delivered by

STORER, J.—This case is reserved from special term for the opinion of all the judges upon the legal questions arising on demurrer.

The plaintiff's petition states, "that on the 12th day of May 1860, at Cincinnati, Henry Essman made his promissory note to William Wolf, or order, for $500, value received, five months after date, which note purported to be indorsed by said Wolf, and afterwards came to the hands of the defendant Williamson, who afterwards indorsed and delivered the same to the plaintiff, *but without recourse on him.*" A copy of the note is made a part of the petition, with the indorsement thus restricted and qualified. It is further alleged, "that the defendant by such indorsement thereby warranted the signature of said William Wolf was genuine and made by him, when, in truth and in fact, it was not, but the same was and is a forgery;" by reason whereof the note was of no value, the said Essman, the maker, being wholly insolvent. There is also the usual averment of demand and notice, and a claim to recover the amount of the note.

The demurrer admitting all the facts properly pleaded and their legal implications, the question is directly presented for our decision, what was the legal effect of defendant's indorsement "without recourse."

We find no English cases where the point has been adjudicated, though qualified indorsements are often made in Great Britain upon bills and notes. Mr. Chitty says, in his work on Bills, p. 235, this mode of indorsing is allowed in France and America, and states the object to be "to transfer the interest in the bill to the indorsee, to enable him to sue thereon, without rendering the indorser personally liable for its payment." In ch. 6, p. 224, 225, he has placed in his text the forms of indorsement applicable to various cases, and in class four, where he describes a qualified indorsement, he illustrates his meaning by using the words "James Atkins, sans recours," or "James Atkins with intent only to transfer my interest and not to be subject to any liability, in case of non-acceptance or non-payment."

Judge STORY adopts this definition with the additional remark, that a qualified indorsement without recourse, though it saves the indorser from liability, does not restrain its negotiability: Prom. Notes, § 146; *Richardson* v. *Lincoln*, 5 Metcalf 201.

An absolute transfer by indorsement imposes upon the party making it, in contemplation of law, 1. That the instrument is genuine, as well as all the attendant signatures; 2. That the indorser has a good title to the instrument; 3. That he is competent to bind himself as indorser; 4. That the maker is able to pay the note, and will do so upon due presentment at maturity; 5. If not paid when thus presented, that upon notice to the indorser he will discharge it: Story on Prom. Notes, § 135.

It must follow, then, that when an indorsement is made and taken without recourse in the qualified form, as it appears upon the note in controversy, every liability, that would otherwise exist, is excluded, and no action can be maintained upon the defendant's transfer thus restricted.

For every practical purpose, such a restricted indorsement may be placed upon the same footing as a note payable to bearer, or transferred by delivery. In the latter case, the person making the transfer does not thereby become a party, nor does he incur the obligation or responsibility belonging to an indorser.

This doctrine was settled by Lord HOLT, in *Gov. and Co. Bank of England* v. *Newman*, 1 Lord Raym. 442, and is adopted by all the late text writers.

It has been attempted, however, to create a liability, not in virtue of any contract contained in the indorsement or delivery of the instrument, but upon a legal implication that there is in every such case a warranty that the instrument is genuine, and should it prove a forgery, he who has transferred it must refund to the proper party the money he may have received.

This assumption places notes and bills on the same footing with merchandise or any other commodity that may have been the subject of sale, and requires him who may have received an equivalent for an instrument subsequently proved to be worthless, to place the party to whom it has been delivered in "*statu quo*."

Now it is not to every case, even between vendor and vendee, that the rule, thus ascertained, can apply; for an article of merchandise, sold without warranty, where the buyer and seller have

equal opportunity to inspect it, and both are equally ignorant of inherent defects, there can be no complaint if a defect is afterwards discovered. It is only when there is concealment, misrepresentation, or fraud, that the seller becomes responsible to the buyer.

We are not surprised at the apparent confusion which exists in the statement of the question by some modern writers upon commercial law; and in the adjudications even of courts who have followed their dicta without careful examination. The difficulty in part, is found in the fact that many of these treatises, when first published, were unpretending volumes, briefly, yet clearly, stating legal principles and referring to decisions equally brief: but edition after edition has been multiplied until the points once settled have become obscured by redundant language, announcing a former doctrine merely in a new form, and the courts have too often been content with quoting cases without tracing the principle to its origin.

They would seem to have forgotten the maxim: "*Melius est petere fontes, quam sectari rivulos.*"

And thus it is we find in the discussion of the point we are about to determine, such a variety of views; positive assertions afterwards qualified on the same page, while they impress upon the reader no definite idea of what the law is; or the statement is so broadly made, that it partakes rather of assumption than matured opinion.

We feel at liberty, therefore, to exercise our own judgment, and we think the conclusion to which we have arrived is fully sustained upon legal principles.

There is no averment in the plaintiff's petition of the manner in which he became the owner of the note, nor yet that he paid value, or gave anything as an equivalent. We may fairly presume, then, he purchased it in the ordinary way in market, no representation being made by the defendant other than the implication that legally follows his qualified indorsement. There is no fact before us which imputes unfair dealing or fraud to the indorser; his liability is claimed simply upon the ground that his assignment was a virtual warranty of the genuineness of the note.

It is then the ordinary case of the owner of a bill sending it into the market for sale, or offering it himself to a purchaser, acting meanwhile in good faith, not concealing any knowledge he

may have, proper for the buyer to know, giving no verbal opinion even that the instrument is valid.

A similar case in principle is found in *Fenn* v. *Harrison*, 3 T. R. 759, where Lord KENYON said: "It is extremely clear that if the holder of a bill of exchange send it to market, without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he has sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter in circulation to impose upon the world instead of the current coin."

So it was held in *Parker* v. *Kennedy*, 2 Bay S. C. 392, "that a bare assignment implies no warranty, but only an agreement to permit the assignee to receive the debt to his own use." So in *Cummings* v. *Lynn*, 1 Dallas 449, and in *Robertson* v. *Vogle*, Id. 255, where Judge SHIPPEN decided, that an indorsement at common law amounts only to an assignment of all the property in the bill or note without making the assignor responsible.

A sale of the note, therefore, as of any other commodity, imposes no liability upon the vendor, simply by the act of sale. It is a purchase by the buyer without warranty, and the rule of "*caveat emptor*" will apply.

If, however, a note is given with a restricted indorsement, in payment of a precedent debt, the better opinion is, if the instrument is afterwards ascertained to be forged, the party receiving it shall not be the loser; he is still to be remunerated for the sum originally due. The thing received having proved to be valueless, the original claim revives.

Not so where the note is disposed of by sale. "While it may be claimed," says Judge STORY, Prom. Notes, § 118, "that he who transfers a note by delivery, warrants in like manner that the instrument is genuine and not forged or fictitious, unless where it is sold as other goods and effects by delivery merely, without indorsement, in which case it has been decided that the law in respect to the sale of goods is applicable, and there is no implied warranty."

So in Chitty on Bills 246, "When a transfer by mere *delivery* is made only by way of *sale* of the bill or note, as sometimes occurs, or in exchange for other bills, or *by way of discount*, and not as a *security* for money lent, or when the assignee expressly

agrees to take it in payment, and run all risks; he has, in general, no right of action against the assignor, if the bill turns out to be of no value."

This view of the question relieves it of all real difficulty, and places the liability of the indorser or assignor upon a satisfactory ground. And we thus find the law determined in the very thoroughly considered case of *Baxter* v. *Durand*, 29 Maine 434, where Judge SHEPLEY, giving the opinion of the whole court, held that "One who sells a promissory note, by delivery, upon which the names of indorsers have been forged, is not liable upon an implied promise to refund the money received therefor, if he sold the same as property and not in payment of a precedent debt, and did not know of the forgery." The learned Chief Justice carefully examined the conflicting cases, and distinguishes very clearly the real question in controversy. He admits the authority of *Jones* v. *Ryde*, 5 Taunt. 488; *Fuller* v. *Smith*, 1 Car. and Payne 197; *Cammidge* v. *Allenby*, 6 B. & C. 373; *Collyer* v. *Brigham*, 1 Metc. 547; but very properly confines them to the case of payment for a previously subsisting debt.

This case is quoted with approbation by Judge STORY, Prom. Notes, § 188, and is relied on as the leading authority by Judge ECCLESTON, in the late case of *Rienan* v. *Fisher*, 12 Maryland 497, where the same point is directly decided, following out not only the ruling of Judge SHEPLEY, but adopting the greater part of his argument. It is also referred to by Professor Parsons, in his late work on Bills and Notes, vol. 2, 589, 590, to support the same doctrine, which is stated in the text of his work very fully and without any reservation.

In a former part of the same volume, page 38, in a note, it is said, the distinction taken in the case in Maine does not seem to have been well founded; but whether the author is responsible for this note or not we cannot say; we should rather believe his unqualified approval of the same case, after he had composed nearly six hundred pages in addition to what he then had written, expresses his true opinion, more especially as he again reiterates the doctrine in the same volume, page 601. The case of *Wheeler* v. *Fowle*, 2 Hardy 149, decided by our late Brother SPENCER, does not conflict with the rule we find so well established; it was determined upon its peculiar circumstances, the whole evidence

being heard, from which a representation, other than the sale and delivery of the note, might have been inferred.

We are all of opinion that the pleadings in this case present no cause of action against the defendant, upon his indorsement. There is no fraud alleged in the transfer; no prior debt existing, for which the note was taken; no representation made beyond the fact of indorsement, without which we hold there could be no recovery by the plaintiff.

The demurrer will be sustained, and the cause remanded.

The importance of the question involved in the foregoing case, and the want of entire uniformity in the decisions in regard to it, seem to justify the space which we have devoted to the very able and carefully-reasoned opinion of the learned judge, and we should not feel called to add anything more, if we did not consider that the tendency in regard to the subject which the case encourages was in the wrong direction.

The weight of authority still is, unquestionably, in favor of the early doctrine of the books, that one who passes a note or bill by mere delivery assumes an implied obligation, in all cases, unless there is something to show a different purpose, that the same is genuine and what it purports to be upon its face, and that he has the legal right to transfer the title to the instrument. This is nothing more than the vendor of goods, without express warranty, assumes, by implication of law.

It is distinctly affirmed in the case of *Gurney* v. *Womersley*, 28 Eng. L. & Eq. 256, s. c. 4 Ell. & Bl. 132, that the vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness; and, if it turns out that the name of one of the parties is forged, and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. In this case the name of the acceptor upon whose credit the bill was discounted by the plaintiffs proved to have been forged by the drawer, the defendant having procured the discount, but declined to give any guarantee in regard to the bill, but had no knowledge of the defect in the bill.

The same, or a similar, question is discussed in *Gompertz* v. *Bartlett*, 24 Eng. L. & Eq. 156, where the bill purported to be a foreign bill, and was unstamped. It proved to have been made in London, and was therefore void, for want of a stamp. The Court of Queen's Bench held, that the vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports to be on its face, and that the vendee might recover back the price of the bill, as upon a failure of consideration.

These decisions were made as late as 1854, and have never been questioned in England, as far as we know. There is no question, we think, that they are in strict analogy with other portions of the law of contracts applicable to sales of personal property and of choses in action, and that they will be maintained in England. There should therefore, as it seems to us, be some very persuasive reason to justify a departure from them and establishing a different rule in this country. The main current of American authority seems to be strong in the same direction.

It is so declared by the most approved text-writers. Mr. Justice STORY, Promissory Notes, § 118, says: "In the

next place he (the vendor of a note, without express guaranty) warrants in the like manner, that the instrument is genuine, and not forged or fictitious," citing Bayley on Bills, ch. 5, § 3, p. 179, 5th ed.; Chitty on Bills, 269–271; Id. ch. 6, p. 244, 9th ed; Id. p. 364, 366; and many decisions, English and American. The law is stated in the same terms in Parsons on Notes and Bills, vol. 2, p. 37.

The learned judge in the principal case seems to infer that, because the case of *Baxter* v. *Duren*, 29 Me. Rep. 434, is referred to by these text-writers, that he may fairly count upon the weight of their testimony in favor of the soundness of that case. But Mr. Justice STORY deceased many years before the date of that decision; and Professor Parsons does not attempt to settle the law upon the point, but contents himself, as most text-writers do, by giving the present state of the authority, which is sufficiently illustrated by the learned judge in the principal case. Professor Parsons did as we should have done; he gave all the decisions, and then gave his adherence to the preponderating side.

The question is examined in *Cabot Bank* v. *Morton*, 4 Gray 156, by a learned jurist, to the weight of whose authority we have all been long accustomed to refer with unhesitating confidence. This distinguished judge states the rule much in the same terms before quoted from Mr. Justice STORY: "It seems to fall under a general rule of law, that, in every sale of personal property, the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it."

The rule is stated by an eminent jurist in Connecticut, Mr. Justice ELLSWORTH, in *Terry* v. *Bissell*, 26 Conn. Rep. 23, much in the same terms, quoting the very language of Chief Justice SHAW, as stated above.

In *Thrall* v. *Newell*, 19 Vermont Rep. 202, the rule is laid down in much the same terms by Judge HALL.

And in *Aldrich* v. *Jackson*, 5 R. I. Rep. 218, Chief Justice AMES says: "The vendor of a bill or note, by the very act of sale, impliedly warrants the genuineness of the signatures of the previous parties to it."

And in New York, since the early case of *Markle* v. *Hatfield*, 2 Johns. 455, it seems to have been regarded as settled, that a payment in forged paper is no payment, upon the ground of an implied warranty of genuineness. But in the late case of *Ketchum* v. *Bank of Commerce*, 19 N. Y. Court of Appeals 499, it was held, by a divided court, that, if the forged paper was sold, there was no implied warranty of genuineness. This seems to be substantially the distinction upon which all the exceptional cases have attempted to stand. It is found, or the germ of it, in the early case of *Ellis* v. *Wild*, 6 Mass. Rep. 321, where merchandise was sold and a promissory note, which proved to be a forgery, taken for it. PARSONS, C. J., held, in delivering the opinion of the full court, that if the note were, by the intention of the parties, sold and payment accepted in "rum," the defendant was not responsible as for an implied warranty of the genuineness of the notes. "But if the plaintiff intended to sell the rum for money, and the defendant intended to buy rum, and the payment by the notes was not a part of the original stipulation, but an accommodation to the defendant; then he has not paid for the rum, and the action is maintainable."

Now we think it fair to say, that when one exchanges rum for promissory notes of a third party, or what purports to be such, and gives no express warranty, the implied warranty is the same

on the part of the one party as of the other. And if the rum proves to be something else, as a preparation of a deadly character, of no value for any purpose, or if it proves not to have been the property of the vendor, but of another who reclaims it, or if the note proves to be a forgery, or stolen under such circumstanees that no title is conveyed by the vendor, either party will be liable to make good the loss to the other, upon the implied warranty of the thing being what it purports to be, and that the vendor had good right to sell as he did. And it is idle to attempt to escape from the question fairly presented, by asking a jury to conjecture whether it was a sale of the note, and accepting payment in rum, "for the accommodation of the purchaser," or a sale of rum, and accepting payment in the note, for like accommodation. And it seems to us, that if such a distinction had been first stated, by some judge or writer, less known to fame than the distinguished Chief Justice of Massachussets, whose word went for law in his time, it would scarcely have been taken up and aeted upon by so many eminent courts as this already has been. It is, in fact, however much it may have been indorsed, nothing more than a refinement, too nice for common apprehension.

But it is proper to say that this whole doctrine of the existence of any such distinction being maintainable is entirely repudiated in a very recent case in Massachusetts, *Merriam* v. *Wolcott*, 3 Allen 258. And we cannot, more to our own mind, express the want of foundation for any such distinction, than by quoting the language of the very able and learned judge, Mr. Justice CHAPMAN, who gave the opinion of the court in the case last cited: "There are two cases which state a distinction in regard to this implied warranty that is not recognised in the other cases," citing *Ellis* v. *Wild*, *supra*, and *Baxter* v. *Duren*, *supra*, to which may now be added *Fisher* v. *Lieman*, 13 Md. Rep. 497, and the principal case. Mr. Justice CHAPMAN continues: "If this is the law of this Commonwealth, then the plaintiff cannot recover * *; but it is difficult to see any valid reason for such a distinction. Whether the purchaser pays cash or discharges a debt in payment for the forged paper, the injury is the same to him. There is in both cases a failure of consideration, growing out of a mistake of facts. The actual contract and the implied understanding as to the genuineness of the note is in both cases the same. And we think that the authorities, which hold the seller to an implied warranty, in such case, that the note is genuine, are in conformity with the principles of sound reason and justice, and with the understanding of the parties in making such a contract;" citing the earlier cases of *Cabot Bank* v. *Morton*, *supra*, and *Lobdell* v. *Baker*, 1 Met. 193, as having already virtually overruled *Ellis* v. *Wild*.

I. F. R.